IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. 937.

THE COLUMBUS GAS AND FUEL COMPANY,
Appellant,

vs.

THE PUBLIC UTILITIES COMMISSION OF OHIO AND THE CITY OF COLUMBUS, OHIO,
Appellees.

MOTION TO DISMISS.

Now comes appellee, the City of Columbus, and moves the court to dismiss the above entitled cause for the reason that the entry of final judgment herein was made at the instance and request of appellant, that it is not aggrieved by such order, and that it is estopped to assert on appeal that the judgment is erroneous in any respect

Respectfully submitted,

JOHN L. DAVIES,
City Attorney,

JAMES W. HUFFMAN,
Special Counsel,

Counsel for the City of Columbus, Ohio.

Columbus, Ohio.
April 18, 1934.

MEMORANDUM IN SUPPORT OF MOTION.

We realize that in the ordinary case an appellant, by his acts and conduct, may only estop himself to assert certain particular errors and yet leave certain other errors open for review. However, where the estoppel operates as to each and all of the asserted errors the appellant has in effect destroyed his entire appeal. The case at issue is of the latter type. We, therefore, believe it proper to protect the rights of this appellee by interposing this motion and memorandum at this time.

On March 22, 1934, The Columbus Gas and Fuel Company filed in the Supreme Court of Ohio a motion in the matter of The Columbus Gas and Fuel Company v. The Public Utilities Commission of Ohio, No. 23864, and The City of Columbus v. The Public Utilities Commission of Ohio, No. 23868, which causes were consolidated by order of the Supreme Court of Ohio, under date of April 25, 1933.

The motion as made is as follows:

> "*Now comes The Columbus Gas and Fuel Company and moves the court for a clarification of its judgment entries herein showing that the same were final and put an end to the litigation and all proceedings thereunder and that the Public Utilities Commission of Ohio has no discretion or alternative except to dismiss the complaint and appeal and to enter an order finding that the rate so fixed by the ordinance of the city of Columbus is just and reasonable and ratifying and confirming said ordinance.*
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> "The necessity for such clarification lies in the

fact that the Supreme Court of the United States was misled by the language of said entries of this court and the claim of the city of Columbus that under the court's mandates said commission might fix a rate other than the ordinance rate and did, on March 19, 1934, in the above entitled cause then pending in said court on appeal, hold that this court had entered no final judgment in this cause, as shown by the certified copy of the entry of the Supreme Court of the United States hereto attached, marked Exhibit 'A' and made a part hereof.

"The further necessity for such clarification lies in the fact that both the supersedeas bond on appeal and the agreement for deposit of moneys made pursuant to the order of supersedeas herein are conditioned upon a final order by this court in this cause, and the rights of the parties to impounded funds can be determined only upon a final order of this court.

"No application is here made for any new order or different judgment. Movant recognizes that if the Public Utilities Commission of Ohio may in any manner change the ordinance rate the judgment herein is not final.

"Movant prays that said clarification of said order be allowed and be made as of June 21, 1933.

Respectfully submitted,
The Columbus Gas and Fuel Company,
By John Weld Peck,
Ingalls Bldg., Cincinnati, Ohio,
Albert M. Calland,
Edward C. Turner,
16 E. Broad St., Columbus, Ohio,
Its Attorneys."

(Italics ours.)

It will be observed that the motion of The Columbus Gas and Fuel Company is fully contained in the first paragraph and that it in substance asks a dismissal of

The bare statement of the motion and resulting judgment are convincing that appellant secured just what it demanded. It moved for a dismissal of the complaint against the 48 cent ordinance rate and the fixing of the ordinance rate as just and reasonable. The court proceeded accordingly to enter a final order.

The original judgment of the Supreme Court of Ohio was not final, either on its face or in fact. It did not become final until the appellant asked and consented that it be made final by the fixing of a 48 cent rate, contrary to the principles expressed by the Supreme Court of Ohio in its opinion. The rights and property of The Columbus Gas and Fuel Company were not finally affected until it requested and secured a modification of the judgment entry.

The Supreme Court of Ohio never made such an order before and it may never find occasion to do so again; in fact, the court stated in its opinion, in accordance with former Ohio decisions, that "It is not the function of this court to fix rates." It was only upon the specific request contained in the motion of appellant that the commission was ordered to fix a definite rate.

True, appellant was attempting to create jurisdiction for the Supreme Court of the United States and for this purpose it moved the Supreme Court of Ohio to fix a definite rate so that only a ministerial act might be left for the Public Utilities Commission to perform. But it asked for a certain rate which was to its own interest and to the prejudice of this appellee. It is our belief that the application of the principles announced by the court will

result in a lower rate than that now ordered at the instance of the appellant. The appellant apparently preferred to have a 48 cent rate fixed as a minimum rather than risk receiving a lower one.

The final order received was requested by the appellant and it has, therefore, by its acts and conduct, consented to and estopped itself from any appeal from such judgment.

In the case of *United States v. Memphis,* 97 U. S., 284, 292, 24 L. Ed., 937, this court said:

> "The second assignment of error is that the alias writ of mandamus commanded the levy of the additional tax, excluding from its operation the property on which the assessments by the front foot for the cost of the pavement had been paid. Whether the exclusion was erroneously directed or not we are not now called upon to determine, for the relator cannot be heard to insist that it was. The action of the court was in this particular exactly what he asked. He presented a petition asking that such property should be excluded from the levy, and he cannot now be permitted to complain in this court of an order made in the inferior court at his instance."

It also has been held by this court that the finality of a judgment of the court of claims cannot be contested by the defendant on account of the filing of amended findings of fact, where this was done at the defendant's request upon motion for a new trial, and he later took an appeal from the judgment after his motion for a new trial was overruled. *United States v. St. Louis & M. Valley Transp. Co.,* 184 U. S., 247, 22 Sup. Ct., 350, 46 L. Ed., 520.

In *Mercelis v. Wilson*, 235 U. S., 579, 583, 35 Sup. Ct. Rep., 150; 59 L. Ed., 370, where the question arose as to whether the court in acting on an appellant's motion to amend was justified in treating the proceeding as in the nature of a bill to quiet title, the court said:

> "The defendants did not appeal and the appellants cannot be heard to complain of the court's action in granting their own motion. Parties cannot give jurisdiction and may sometimes except to an erroneous ruling of the court in their favor. Capron v. Van Noorden, 2 Cranch, 126; United States v. Huckabee, 16 Wall., 414, 433; Mansfield &c. Ry v. Swan, 111 U. S., 379, 382.
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> "But in this case the court had jurisdiction of the subject-matter and of the parties before it, and therefore the appellants cannot ask for a reversal because of a ruling which, if not actually invoked, was voluntarily acted upon by them when they assented that the bill should be converted into a proceeding to quiet title. Cowley v. Northern Pacific R. R., 159 U. S., 569; Perego v. Dodge, 163 U. S., 160; United States v. Memphis, 97 U. S., 284; Connell v. Smiley, 156 U. S., 335; Bethell v. Mathews, 13 Wall., 1, 2. The case involved the fixing of a line. When the question was settled it was proper to quiet the title of each party as against the other up to the line thus established. The findings support the decree, which not only operated to prevent the multiplicity of suits referred to in the original bill, but was in accord with the character of the proceedings, which the appellants themselves asked the court to make."

It has been held by this court that:

> "An appeal will not be dismissed upon the ground that the decree from which it was taken was rendered by consent; but no errors will be considered here which were in law waived by such consent.

"A recital in the decree that it was assented to by the solicitor of one of the parties is equivalent to a direct finding that he had authority to do what he did, and, so far as the question is one of fact only, is binding upon this court on appeal."

In delivering the opinion Mr. Chief Justice Waite said:

"* * *. If, when the case gets here, it appears that the decree appealed from was assented to by the appellant, we cannot consider any errors that may be assigned which were in law waived by the consent, but we must still receive and decide the case. If all the errors complained of come within the waiver, the decree below will be affirmed, but only after hearing." *Pacific Railroad v. Ketchum*, 101 U. S., 289, 295; 25 L. Ed., 932.

In the cause at bar the appellant, by its motion and action, consented to a 48 cent rate and the dismissal of the case and by so doing waived any error that may have been committed in connection therewith.

Many cases may be cited as authority for the rule that a judgment at the request of or with the consent of a party is not reviewable on his appeal. The following federal cases may be noted:

National Loan & Investment v. Rockland Co., 94 Fed., 335, where it is said by the court:

"An examination of the record, however, discloses the fact that the defendant in error cannot be permitted to urge this objection. Its counsel expressly requested the referee to make this finding. Parties cannot avail themselves of errors which they have themselves committed, or which they have induced the referee or judge who tried their case to make. Walton v. Railway Co., 6 C. C. A., 223, 225, 56 Fed., 1006, 1008; Chase v. Driver, 92 Fed., 780;

Long v. Fox, 100 Ill., 43, 50; Nitche v. Earle, 117 Ind., 270, 275, 19 N. E., 749; Dunning v. West, 66 Ill., 366, 367; Noble v. Blount, 77 Mo., 235; Holmes v. Braidwood, 82 Mo., 610, 617; Price v. Town of Breckenridge, 92 Mo., 378, 387, 5. S. W., 20; Fairbanks v. Long, 91 Mo., 628, 633, 4 S. W., 499."

In *Francisco v. Chicago & A. R. Co.*, 149 Fed., 354, it was held:

"No writ of error will lie at the suit of a plaintiff to review a judgment of nonsuit or dismissal rendered in a national court at his request or with his consent."

A pertinent part of the court's opinion follows:

"But invited error is irremediable. If the court erred in the rendition of the judgment of non-suit, it erred at the plaintiff's request and to the prejudice of the defendant, and that error can form no ground for the reversal of the judgment at the suit of the plaintiff who procured it. A judgment of nonsuit upon the motion or request of the defendant and against the objection or protest of the plaintiff is reviewable by writ of error. Central Transp. Co. v. Pullman's Car Co., 139 U. S., 24, 29, 39, 40, 11 Sup. Ct., 478, 35 L. Ed., 55; Meehan v. Valentine, 145 U. S., 611, 164, 618, 12 Sup. Ct., 972, 36 L. Ed., 835.

"But a judgment of nonsuit on the motion, at the request or with the consent of the plaintiff, is not reviewable by writ of error at his suit, because he is estopped from convicting the trial court of an error which he requested it to commit. U. S. v. Evans, 5 Cranch (U. S.), 280, 3 L. Ed., 101; Evans v. Phillips, 4 Wheat. (U. S.), 73, 4 L. Ed., 516; Central Transp. Co. v. Pullman' sCar Co., 139 U. S., 24, 39, 11 Sup. Ct., 478, 35 L. Ed., 55; Maxwell Land Grant Co. v. Dawson, 151 U. S., 586, 606, 14 Sup. Ct., 458, 38 L. Ed., 279; Avendano v. Gay, 8 Wall. (U. S.), 376, 377,

19 L. Ed., 422; U. S. v. St. Louis, etc., Trans. Co., 184 U. S., 247, 249, 22 Sup. Ct., 350, 46 L. Ed., 520."

The same principle has been applied generally in state courts. *Campbell v. Crone,* 10 Nebr., 571, 7 N. W., 334; *Ellison v. Smith,* 107 Ark., 614, 156 S. W., 417; *Williams Jr. v. Lowe,* 79 N. J. Eq., 173, 81 A., 760; *Clark v. Tull,* 113 Iowa, 143, 84 N. W., 1030; *Sponseller v. Sponseller,* 110 O. S., 395, 400, 144 N. E., 48.

Since it is apparent that the final judgment in this cause was secured at the instance and request of the appellant, that it is one which the application of the principles announced by the court in reversing the commission will not necessarily produce, but one to which the appellant has by its action consented, the appellant has estopped itself to complain of such judgment.

It may be observed that the final judgment herein entered on March 30, 1934, at the instance and request of the appellant, was not a nunc pro tunc judgment since none of the elements of a nunc pro tunc were existing, yet at the special request of appellant the final judgment was dated back to June 21, 1933. If the dating back of this final judgment under the circumstances was effective then appellant is confronted with the further objection that this appeal comes too late under the rule. However, conceding for the sake of argument that the final judgment does not relate back and that its date of issuance is the true date of March 30, 1934, still the appellant is met on this new appeal with the full force of the estoppel created by its own request as hereinbefore presented.

In either event we believe the cause should be dismissed.

Respectfully submitted,

JOHN L. DAVIES,

City Attorney,

JAMES W. HUFFMAN,

Special Counsel,

Counsel for the City of Columbus.